

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

GARY JAMES SMITH,)
Petitioner,)
v.) Case No. CIV-20-1310-D
RICK WHITTEN,)
Respondent.)

ORDER

This matter comes before the Court for review of the Report and Recommendation [Doc. No. 31] issued by United States Magistrate Judge Shon T. Erwin pursuant to 28 U.S.C. § 636(b)(1)(B). Petitioner Gary James Smith, a state prisoner appearing *pro se*, filed a Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254, seeking relief for ineffective assistance of counsel [Doc. No. 6]. Judge Erwin recommends that this action be dismissed without prejudice for failure to comply with the Court's orders.

The case file shows no timely objection to the Report nor request for an extension of time, even though Petitioner was expressly informed of his right to object and the consequences of failing to object. Therefore, the Court finds that Petitioner has waived further review of all issues addressed in the Report. *See Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *see also United States v. 2121 East 30th Street*, 73 F.3d 1057, 1060 (10th Cir. 1996). For the reasons explained by Judge Erwin, the Court finds that this action should be dismissed without prejudice.

IT IS THEREFORE ORDERED that the Report and Recommendation [Doc. No. 35] is **ADOPTED** in its entirety. This action is **DISMISSED** without prejudice. A separate judgment of dismissal shall be entered.

IT IS FURTHER ORDERED that pursuant to Rule 11(a) of the Rules Governing Section 2254 Cases, the Court must issue or deny a certificate of appealability (“COA”) when it enters a final order adverse to a petitioner. A COA may issue only upon “a substantial showing of the denial of a constitutional right.” *See* 28 U.S.C. §2253(c)(2). “When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). “A petitioner satisfies this standard by demonstrating that jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003). Upon consideration, the Court finds the requisite standard is not met in this case. Therefore, a COA will be denied. The denial shall be included in the judgment.

IT IS SO ORDERED this 16th day of June, 2022.



TIMOTHY D. DeGIUSTI
Chief United States District Judge